

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA

|  |   |                                  |
|--|---|----------------------------------|
| Gladstone L.O. Cummings, #267450;              | ) | C/A No. 3:05-2789-RBH-JRM        |
|  | ) |                                  |
| Petitioner;                                    | ) |                                  |
|  | ) |                                  |
| vs.  | ) | <b>Report and Recommendation</b> |
|  | ) |                                  |
| Warden Stan Burt; and Henry McMaster, Attorney | ) |                                  |
| General for South Carolina;                    | ) |                                  |
|  | ) |                                  |
| Respondents.                                   | ) |                                  |
|  | ) |                                  |

---

The Petitioner, Gladstone Cummings (hereafter, the “Petitioner”), is a state prisoner proceeding *pro se* under Title 28 United States Code Section 2254. By definition, the relief which Petitioner seeks must be based upon a finding that he is being illegally detained in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. §2241(b)(3). Pursuant to the provisions of 28 U.S.C. §636(b)(1)(B), and Local Rule 73.02(B)(2)(c), D.S.C., the undersigned is authorized to review such petitions for relief and submit findings and recommendations to the District Court.

**BACKGROUND**

Petitioner is incarcerated at Lieber Correctional Institution serving a sentence of twenty-two years imprisonment after he entered a guilty plea to cocaine trafficking charges in June, 2000, before the Dorchester County Court of General Sessions. Petitioner has filed a copy of the trial court’s sentence with his pleading in this action.

In his § 2254 petition, Petitioner asserts that the sentencing court lacked subject matter jurisdiction to accept his plea to a charge which he contends was not part of the indictment. He presents no other grounds for relief. [1-1, p. 6]

Petitioner also states that he did not file an appeal in South Carolina state courts from his conviction. Instead, on three different occasions, he filed *habeas corpus* petitions directly in the South Carolina Supreme Court. These petitions were all dismissed. Finally, the Petitioner describes a Post-Conviction Relief (PCR) application, Cummings v. State, 2004-CP-38-1220, which has been pending since 2004, with one interlocutory appeal to the South Carolina Supreme Court. That appeal was dismissed and the action returned to the PCR court in April, 2005, according to Petitioner's exhibits. Petitioner reports that his PCR proceeding is "still pending." [1-1, pp. 8 and 13.]

### **PRO SE PETITION**

Petitioner is a *pro se* litigant, and thus his pleadings are accorded liberal construction. Hughes v. Rowe, 449 U.S. 5 (1980); Estelle v. Gamble, 429 U.S. 97 (1976); Haines v. Kerner, 404 U.S. 519 (1972); Loe v. Armistead, 582 F. 2d 1291 (4<sup>th</sup> Cir. 1978); Gordon v. Leeke, 574 F. 2d 1147 (4<sup>th</sup> 1978). *Pro se* pleadings are held to a less stringent standard than those drafted by attorneys. Even under this less stringent standard, however, the *pro se* Petition is still subject to summary dismissal. The mandated liberal construction means only that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so. Barnett v. Hargett, 174 F.3d 1128 (10<sup>th</sup> Cir. 1999). A court may not construct the plaintiff's legal arguments for him. Small v. Endicott, 998 F.2d 411 (7<sup>th</sup> Cir. 1993). Nor should a court "conjure up questions never squarely presented." Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4<sup>th</sup> Cir. 1985).

A careful review has been made of the *pro se* petition pursuant to the procedural provisions of 28 U.S.C. § 1915 and the Anti-Terrorism and Effective Death Penalty Act of 1996.

The review has been conducted in light of the following precedents: Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319, 324-325 (1989); Nasim v. Warden, Maryland House of Correction, 64 F.3d 951 (4<sup>th</sup>Cir. 1995)cert. denied, 516 U.S. 1177 (1996); Todd v. Baskerville, 712 F.2d 70 (4<sup>th</sup>Cir. 1983); and Boyce v. Alizaduh, 595 F.2d 948 (4<sup>th</sup>Cir. 1979).

### **EXHAUSTION OF STATE REMEDIES**

Relief under § 2254 may only be pursued in this Court after the petitioner has exhausted his state court remedies. See 28 U.S.C. § 2254(b); Picard v Connor, 404 U.S. 270 (1971); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490-491 (1973). The exhaustion requirement is “grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner’s federal rights.” Coleman v. Thompson, 501 U.S. 722, 731 (1991). In Mallory v. Smith, 27 F. 3d 992, 994 (4<sup>th</sup> Cir. 1994), the United States Court of Appeals for the Fourth Circuit declared that the habeas petitioner must “make more than a perfunctory jaunt through the state court system.” A petitioner is required to present fully and squarely to the state courts the same issues upon which he would rely in this Court.

In Petitioner v. Evatt, 105 F3d. 907 (4<sup>th</sup>Cir. 1997), the Fourth Circuit once again reviewed the authorities on the exhaustion requirement (including Mallory) and declared that “[t]o satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state’s highest court. The burden of proving that a claim has been exhausted lies with the petitioner.” 105 F 3d at 910-911 (citations omitted).

Petitioner clearly states that his PCR application has not yet been decided. A federal district court will not interfere in ongoing state court proceedings, absent extraordinary

circumstances. See, e.g., Younger v. Harris, 401 U.S. 37, 44 (1971). In Cinema Blue of Charlotte, Inc. v. Gilchrist, 887 F.2d 49, 50-53 (4th Cir. 1989), the Fourth Circuit ruled that federal district courts should abstain from constitutional challenges to state judicial proceedings, no matter how meritorious, if the federal claims have been or could be presented in an ongoing state judicial proceeding. Accordingly, federal *habeas corpus* relief is not available to Petitioner.

### **RECOMMENDATION**

Accordingly, it is recommended that the above-captioned case be dismissed without prejudice and without requiring the respondents to file an answer. See Allen v. Perini, 424 F.2d 134, 141 (6<sup>th</sup> Cir. 1970)(federal district courts have duty to screen habeas corpus petitions and eliminate burden placed on respondents caused by ordering an unnecessary answer or return), cert. denied, 400 U.S. 906 (1970). The petitioner's attention is directed to the notice on the next page.

Respectfully Submitted,

s/Joseph R. McCrorey  
United States Magistrate Judge

September 28, 2005  
Columbia, South Carolina

**Notice of Right to File Objections to Magistrate Judge's "Report and Recommendation"**  
**&**  
**The Serious Consequences of a Failure to Do So**

The petitioner is hereby notified that any objections to the attached Report and Recommendation (or Order and Recommendation) must be filed within **ten (10) days** of the date of its filing. 28 U.S.C. § 636 and Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three days for filing by mail. Fed. R. Civ. P. 6. Based thereon, this Report and Recommendation, any objections thereto, and the case file will be **delivered to a United States District Judge** fourteen (14) days after this Report and Recommendation is filed. Advance Coating Technology, Inc. v. LEP Chemical, Ltd., 142 F.R.D. 91, 94 & n. 3, 1992 U.S. Dist. LEXIS® 6243 (S.D.N.Y. 1992). A magistrate judge makes only a recommendation, and the authority to make a final determination in this case rests with the United States District Judge. *See Mathews v. Weber*, 423 U.S. 261, 270-271 (1976); and *Estrada v. Witkowski*, 816 F. Supp. 408, 410, 1993 U.S. Dist. LEXIS® 3411 (D.S.C. 1993).

During the ten-day period, but not thereafter, a party must file with the Clerk of Court specific, written objections to the Report and Recommendation, if he or she wishes the United States District Judge to consider any objections. **Any written objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** *See Keeler v. Pea*, 782 F. Supp. 42, 43-44, 1992 U.S. Dist. LEXIS® 8250 (D.S.C. 1992); and *Oliverson v. West Valley City*, 875 F. Supp. 1465, 1467 (D.Utah 1995). Failure to file written objections shall constitute a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the United States District Judge. *See United States v. Schronce*, 727 F.2d 91, 94 & n. 4 (4th Cir.), *cert. denied*, *Schronce v. United States*, 467 U.S. 1208 (1984); and *Wright v. Collins*, 766 F.2d 841, 845-847 & nn. 1-3 (4th Cir. 1985). Moreover, if a party files specific objections to a portion of a magistrate judge's Report and Recommendation, but does not file specific objections to other portions of the Report and Recommendation, that party waives appellate review of the portions of the magistrate judge's Report and Recommendation to which he or she did not object. In other words, a party's failure to object to one issue in a magistrate judge's Report and Recommendation precludes that party from subsequently raising that issue on appeal, even if objections are filed on other issues. *Howard v. Secretary of HHS*, 932 F.2d 505, 508-509, 1991 U.S. App. LEXIS® 8487 (6th Cir. 1991). *See also Praylow v. Martin*, 761 F.2d 179, 180 n. 1 (4th Cir.) (party precluded from raising on appeal factual issue to which it did not object in the district court), *cert. denied*, 474 U.S. 1009 (1985). In *Howard*, *supra*, the Court stated that general, non-specific objections are *not* sufficient:

**A general objection to the entirety of the [magistrate judge's] report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the [magistrate judge] useless. \* \* \* This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act. \* \* \* We would hardly countenance an appellant's brief simply objecting to the district court's determination without explaining the source of the error.**

*Accord Lockert v. Faulkner*, 843 F.2d 1015, 1017-1019 (7th Cir. 1988), where the Court held that the appellant, who proceeded *pro se* in the district court, was barred from raising issues on appeal that he did not specifically raise in his objections to the district court:

**Just as a complaint stating only 'I complain' states no claim, an objection stating only 'I object' preserves no issue for review. \* \* \* A district judge should not have to guess what arguments an objecting party depends on when reviewing a [magistrate judge's] report.**

*See also Branch v. Martin*, 886 F.2d 1043, 1046, 1989 U.S. App. LEXIS® 15,084 (8th Cir. 1989) ("no de novo review if objections are untimely or general"), which involved a *pro se* litigant; and *Goney v. Clark*, 749 F.2d 5, 7 n. 1 (3rd Cir. 1984) ("plaintiff's objections lacked the specificity to trigger *de novo* review"). **This notice, hereby, apprises the petitioner of the consequences of a failure to file specific, written objections.** *See Wright v. Collins*, *supra*; and *Small v. Secretary of HHS*, 892 F.2d 15, 16, 1989 U.S. App. LEXIS® 19,302 (2nd Cir. 1989). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections addressed as follows:

Larry W. Propes, Clerk  
 United States District Court  
 901 Richland Street  
 Columbia, South Carolina 29201